Sherwin-Williams Company *and* Daniel Ornelas. Case 32–CA–12396

November 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On April 29, 1993, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, an answering brief to the General Counsel's exception, and a reply to the General Counsel's answering brief. The General Counsel filed an exception with a supporting brief and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

We agree with the judge that the Respondent discharged Ornelas because of his union activities at his former place of employment (DeSoto). In this regard, we note that Ornelas was a union steward at DeSoto and the Respondent knew of this activity. The Respondent's knowledge was derived through its production manager (Hamilton) who was a former plant manager of DeSoto. Hamilton knew of Ornelas' reputation, at DeSoto, as a ''shit disturber.''[3] We also note the factor of timing. Ornelas was discharged on the second day of his employment, on the heels of Hamilton's raising a concern about the wisdom of hiring Ornelas.

Finally, we agree with the judge that the reasons given for the discharge were pretextual. The fact that an employer gives a pretextual reason for a discharge shows that the employer wishes to hide the real reason for the discharge. Concededly, the pretext does not necessarily establish that the real reason was union activity.[4] However, given the evidence discussed above, we think it reasonable to infer that the concealed reason in this case was union activity.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Sherwin-Williams Company, Emeryville, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In his recommended Order, the judge provided that the Respondent offer Ornelas immediate and full reinstatement to his former position of employment. The General Counsel excepts to the failure of the judge to clarify that Ornelas be reinstated as a permanent employee, notwithstanding his probationary status at the time of his discharge. Contrary to the General Counsel, we find that reinstatement to probationary status provides Ornelas with an adequate remedy and is in accord with the purposes and policies of the Act. Therefore, Ornelas is to be reinstated as a probationary employee.

[3] We agree with the judge that, in the absence of any other interpretation, it may reasonably be inferred that the phrase refers to Ornelas' union activities at DeSoto.

[4] For example, the real reason may be race or gender or some other invidious reason which the Employer wishes to conceal.

[5] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

We recognize that the General Counsel may have failed to present independent evidence of antiunion animus. However, the ultimate issue to be decided is whether the discharge was motivated by union activity. To be sure, where there is independent evidence of union animus, such evidence can be an element of a showing that a discharge was based on union activity. But such evidence is not a sine qua non for establishing the violation. Rather, we look to all of the circumstances of a case to determine whether a discharge was unlawfully motivated. In the instant case, these circumstances include union activity by the dischargee, employer knowledge, timing, and pretextual reasons give for the discharge.

Daniel F. Altemus Jr., Esq., for the General Counsel.
Hazel M. Willacy, Director of Labor Relations, of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Oakland, California, on January 19, 1993. The charge was filed by Daniel Ornelas, an individual, on March 4, 1992. Thereafter, on May 7, 1992, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Sherwin-Williams Company (the Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent's answer to the complaint, duly filed, denies the commission of any unfair labor practices.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing briefs have been received from counsel for the General Counsel and counsel for the Respondent.

On the entire record, and based on my observation of the witnesses and the briefs submitted by counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Ohio corporation with an office and manufacturing facility located in Emeryville, California, and is engaged in the manufacture of paint products. In the course and conduct of its business operations the Respondent

annually sells and ships goods or provides services valued in excess of $50,000 directly to customers located outside the State of California, and annually purchases and receives goods or services valued in excess of $50,000 directly from suppliers located outside the State of California.

It is admitted, and I find, that the Respondent has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that Paint Makers and Allied Trades Local Union No. 1975, International Brotherhood of Painters and Allied Trades, AFL–CIO, CLC (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issue raised by the pleadings is whether the Respondent discharged employee Daniel Ornelas because of his union activity while formerly in the employ of another employer, in violation of Section 8(a)(3) and (1) of the Act.

B. *The Facts*

Daniel Ornelas began working for the Respondent on March 2, 1992.[1] He was discharged the following day. It is admitted that his discharge was unrelated to any work that he performed for the Respondent during his 2-day tenure. Rather, it is the Respondent's position that he was discharged because of attendance problems while working for a previous employer, DeSoto Paint Company (DeSoto). The General Counsel maintains that the Respondent's avowed reason for discharging Ornelas is pretextual, and that the true motivation for the discharge is because of Ornelas' activity as a union steward while working for DeSoto.

The approximately 50 to 60 warehouse and manufacturing employees of DeSoto were represented by the Union and there was a collective-bargaining agreement in effect. Ornelas worked in DeSoto's warehouse department for approximately 4-1/2 years. During the last 2 years of his employment, he was one of two union stewards in the warehouse. On some occasions the manufacturing employees would select Ornelas as their spokesman to handle union-related matters with management, even though they could have elected to be represented by two other stewards who worked in the manufacturing facility across the street from the warehouse.

The DeSoto plant manager was Larry Johnson, the plant superintendent was Mark Hamilton, and Scott Wright was warehouse manager. George Lyon was DeSoto's personnel manager.

Ornelas testified that as a union steward at DeSoto his responsibilities included efforts to resolve employee complaints with an aggrieved employee's immediate supervisor, and, in the absence of a satisfactory resolution of the matter, the processing of a formal grievance. In this event, Ornelas would participate in the presentation of the grievance. In addition, Ornelas was involved in contract negotiations. In the aforementioned endeavors, Ornelas had occasion to speak with Plant Superintendent Hamilton ''over a dozen times'' regarding union-related matters. On some of these occasions he would just step into Hamilton's office and discuss different employee complaints which had not yet reached the grievance stage. During formal grievances he would meet with several company representatives, including supervisors, the personnel manager, and Hamilton. In 1990 Ornelas was on the Union's negotiating committee and assisted in negotiating a contract with DeSoto's negotiating team, which included Hamilton. During contract negotiations, according to Ornelas, there was ''a little hollering and stuff,'' but ''it wasn't like we were going to kill each other or anything like that.''

Ornelas recalled a specific situation regarding the discipline of an employee. During this meeting Hamilton told the employee to either straighten up or, apparently, face termination. Ornelas testified that although he, as union steward, ''sensed'' hostility or animosity during this occasion, Hamilton did not exhibit any overt hostility toward him as the employee's union representative.

There was virtually no contact between Ornelas and Hamilton on a daily work-related basis, and, according to Ornelas, Hamilton did not monitor his attendance or his willingness to work overtime.

In about October 1990, DeSoto's operations were sold to two separate entities, one of which happened to be the Respondent herein. In preparation for this change in ownership approximately 25 employees, including Ornelas, were laid off in December 1990, in order of seniority.

Sometime in 1991, DeSoto Plant Superintendent Hamilton was hired by the Respondent as production manager. Dale Hitchcock was the Respondent's personnel manager. The employees at the Respondent's plant were also represented by the Union herein, and were covered under the terms of a collective-bargaining agreement that was similar in all material respects with the aforementioned DeSoto contract.

Following his layoff from DeSoto, Ornelas obtained various jobs through the Union's hiring hall, and in early 1992 he applied for a job with the Respondent. The hiring process consisted of an interview with a production or warehouse supervisor, a drug test, and a physical examination. He began working for the Respondent on March 2. On March 3, at the end of his second day of employment, Ornelas was summoned to the office of Personnel Manager Dale Hitchcock, who advised Ornelas that he was being terminated. Ornelas asked why, and Hitchcock said that there were two reasons: lack of work and Ornelas' attendance record with a former employer. Ornelas denied that he had had any attendance problems at DeSoto and asked for an explanation. Hitchcock, according to Ornelas, replied that the current collective-bargaining agreement between the Respondent and the Union permitted summary termination of an employee during the probationary period, and did not explain further.

Hitchcock testified that he terminated Ornelas on March 3 as a result of Production Manager Hamilton's complaint, on learning that Ornelas had been hired, that it had been a mistake to hire Ornelas because he had ''an attendance problem'' at DeSoto and would not be a favorable employee. During this conversation, according to Hitchcock, Hamilton did not mention an ''overtime'' problem, discussed infra. Explaining that as a result of past experience he was particu-

[1] All dates or time periods herein are within 1992, unless otherwise specified.

larly sensitive to the possibility of employees in legally protected groups (Ornelas is Hispanic) seeking recourse with the Equal Employment Opportunity Commission, Hitchcock testified that he was reluctant to take any immediate action prior to investigation of Hamilton's claim, and that he instructed Hamilton to provide him with some corroboration of Ornelas' poor attendance at DeSoto. Hamilton did not do so, however, and Ornelas was terminated prior to Hamilton's reporting back to Hitchcock that day.

Ornelas filed the Charge in the instant matter on March 4, the day following his termination. Several days following the discharge, Hitchcock phoned the former DeSoto personnel manager, George Lyon, and asked him if he would testify regarding Ornelas' attendance problem while working for DeSoto. Lyon stated that Ornelas did not have an attendance problem.

Hamilton testified that he spoke with Hitchcock immediately on learning that Ornelas had been hired and told him that Ornelas had an attendance problem at DeSoto and should not have been hired by the Respondent. Hamilton acknowledged that Ornelas had never worked under his supervision at DeSoto and that he became aware of Ornelas' attendance problems at DeSoto solely as a result of casual discussions or scheduled meetings among DeSoto managers and supervisors, during which, according to Hamilton's March 19 affidavit, ''[Ornelas'] name often came up with regard to occurrences under the Attendance Program.'' While Hamilton testified that Ornelas' name was mentioned in this regard about a ''half a dozen'' times in 1990, he had no specific recollection of any particular discussions.

Hamilton testified that the problem with Ornelas' attendance did not arise during the regular Monday through Friday workweek, but rather concerned Ornelas' reluctance to work overtime on Saturdays. The overtime policy under the union contract at DeSoto and, similarly, at the Respondent's facility, permitted the scheduling by management of mandatory overtime work. Employees were then required to work overtime, but could request to be excused from such work for specific reasons, and the managers or supervisors could grant or deny the requests according to scheduling needs. Hamilton acknowledged that the mere fact that on several occasions an employee may have requested and been granted permission not to work overtime would not be construed as an attendance problem. While Hamilton admitted that, in causing Hitchcock to terminate Ornelas, he did not mention any overtime problem, nevertheless Hamilton stated that in his opinion Ornelas' alleged requests to be excused from overtime work was attendance related, even though the procedure for being excused from overtime was sanctioned under the union contract and was in accordance with customary practice.

There is significant discrepancy between Hamilton's testimony, his March 19 affidavit given to the Board, and the position letter of the Respondent which sets forth Hamilton's alleged account of his contacts with former DeSoto managers and supervisors. Thus, Hamilton phoned former DeSoto Personnel Manager Lyon, former DeSoto Warehouse Manager Scott Wright, and former DeSoto Plant Manager Larry Johnson. Hamilton's March 19 affidavit to the Board states that each of the three individuals refused to provide him with any information which would corroborate his recollection of Ornelas' attendance problem.

In a position letter to the Board dated April 10, however, the Respondent represented that on the morning of March 3, Hamilton advised Hitchcock of Ornelas' undesirability as an employee, that he ''immediately thereafter'' phoned Lyon, Wright, and Johnson; that upon mentioning Ornelas' name to Lyon, Lyon allegedly replied, ''You didn't hire that guy did you,'' and added, ''shoot him, he doesn't have his 110 days''; that Hamilton replied that ''we want to make it clean,'' and requested that Lyon confirm that Ornelas had an attendance problem and would not work overtime; and that Lyon acknowledged this, and said, ''You really shouldn't have hired him.''

Hamilton testified that he had a similar conversation with Wright, who exclaimed, ''Oh, my goodness, you didn't hire [Ornelas] did you,'' and also confirmed that Ornelas had an attendance problem, would not work overtime, and should not have been hired.

Hamilton testified that Lyon and Wright did indeed make the foregoing statements attributed to them in the Respondent's position letter, but that he did not include such statements in his March 19 affidavit to the Board because he did not feel the conversations contained sufficient corroborative information. Rather, he simply stated in his affidavit that the aforementioned individuals refused to furnish him with any substantiation of Ornelas' alleged deficiencies. Asked to explain this apparent discrepancy, Hamilton stated that although Lyon and Wright acknowledged Ornelas' attendance problem, they refused to cooperate further by providing any written documentation of Ornelas' deficient attendance and told Hamilton that they were speaking to him ''off the record.'' While Hamilton testified that he reported the aforementioned conversations with Lyon and Wright to Personnel Manager Hitchcock prior to Ornelas' discharge, I discredit this assertion, infra.

Hamilton acknowledged that Ornelas had been a union steward at DeSoto, that on occasion he dealt directly with Ornelas on grievances concerning employees in the manufacturing facility, and that Ornelas was on the union negotiating team. Other than such matters, Hamilton had only occasional contact with Ornelas. Hamilton said that he had ''very few'' dealings with Ornelas regarding union-related matters, and would not consider him to be an aggressive union steward. However, according to Hamilton, both Wright and Lyon and several DeSoto manufacturing or warehouse employees may have possibly referred to Ornelas as a ''shit disturber.''

Asked what specific information caused him to tell Hitchcock to terminate Ornelas, Hamilton testified:

> I based it on conversations with different managers, possibly one at a time or collectively with my supervisors, and maintaining consistency with the corrective action program with attendance. During the change of the attendance policy, again, his name may have come up in there, I cannot specifically say that.

Further, Hamilton admitted that he did not could not recollect anything specific about Ornelas' attendance problems, that he never heard about any specific attendance problems or occurrences regarding Ornelas from Warehouse Manager Wright, and that he subsequently learned about the alleged overtime problem after talking to three former DeSoto managers, infra.

Asked why Ornelas was not given a chance to demonstrate his reliability and proficiency as a new employee, Hamilton stated that he simply did not want to take a chance with an employee who might not make it through the probationary period, as the Respondent would be expending the time and expense of training a new hire who was unlikely to become a permanent employee; further, there were ample applicants for the available positions.

Larry Johnson was formerly plant manager at the DeSoto plant. Hamilton reported to him. Johnson testified that sometime in March he received a phone call from Hamilton, who said that Ornelas had been hired and then terminated by the Respondent. Hamilton asked if Johnson would be willing to forward records substantiating that Ornelas had an attendance problem and ''was not eligible for rehire'' at DeSoto. Johnson replied that the DeSoto records were at the Company's headquarters in Des Plaines, Illinois, and referred Hamilton to that entity. Further, he told Hamilton that he did not recall that Ornelas had an attendance problem at DeSoto.

Johnson testified that he considered Ornelas to be an ''assertive'' rather than an ''aggressive'' union steward, who ''knew what he wanted when he had a problem with people. And he wanted the people to get some kind of a break, or get the situation explained to him to the fullest extent . . . I think he wanted an answer.'' Johnson recalled that while working with Ornelas on grievance matters, Ornelas told him on several occasions that he did not like to work overtime; according to Johnson, Ornelas made this very clear.

George Lyon was personnel manager at DeSoto. Lyon testified that he had dealt with Ornelas in his capacity as a shop steward. In March he received a phone call from Hamilton who said that Ornelas had been hired and terminated by the Respondent. Hamilton inquired whether Ornelas had an attendance problem. Lyon replied, apparently in response to questions from Hamilton, that Ornelas did not have a problem with attendance at DeSoto, and that Ornelas was laid off due to business considerations and did not lose his job at DeSoto because of an attendance problem.

Several days later, Lyon received a phone call from Personnel Manager Hitchcock, who asked whether, if it became necessary, he would attest to the fact that Ornelas had an attendance problem at DeSoto. Lyon repeated what he had previously told Hamilton, namely, that Ornelas had no attendance problem, and was terminated by DeSoto only because of the sale of the business. Lyon, at the hearing herein, was shown the position paper of the Respondent containing Hamilton's aforementioned alleged account of the phone conversation. Lyon denied that such a conversation with Hamilton had occurred. Regarding his recollection of Ornelas' employment at DeSoto, Lyon did recall that Ornelas had stated he did not like to work overtime.

Scott Wright was the warehouse manager for DeSoto and supervised Ornelas. Wright testified that he received a phone call from Hamilton on March 5 or 6. Hamilton advised Wright that Ornelas had been hired and then terminated by the Respondent, and that he was ''looking for good reasoning,'' and ''suspected'' that Ornelas had an attendance problem while working for DeSoto. Lyon told Hamilton that ''we did have problems with [Ornelas] always needing to leave our shift at regular time instead of working overtime, not always, but frequently. During the week and on Saturdays.'' Reluctance to work overtime, however, was not considered to reflect adversely upon an employee and was not an ''occurrence'' under the formal ''Attendance Policy.''

Finally, Wright testified that there were meetings with the managers and supervisors at DeSoto regarding the application of the attendance policy, and that Ornelas' name was never mentioned as an example of an employee who had an attendance problem.

Regarding the overtime policy, Wright explained that overtime during the regular workweek was very rarely voluntary, and employees would customarily not be able to be excused from such overtime. However, overtime on Saturdays was usually on a voluntary basis and employees were requested to volunteer for such work in accordance with seniority.[2] Since Ornelas was close to the bottom of the seniority list, he usually would not be excused from overtime work. Ornelas never volunteered for overtime work, but he never refused to work mandatory overtime; he did complain about the overtime that was required, however, apparently believing that it was unnecessary.

Wright was asked whether he would have recalled Ornelas after the layoff at DeSoto if there were positions available. He replied that he did not know whether he would want Ornelas back if he had to chose between Ornelas and another equally qualified applicant. Wright explained that he and Ornelas did not agree on the way the work should be done and had ''totally different personalities.'' According to Wright, Ornelas was ''assertive to the protection of himself and his employees and as opposed to open-mindedness towards employees and company combined. So we simply didn't see eye to eye on a lot of things.'' According to Wright, however, his differences with Ornelas had nothing to do with Ornelas' conduct as a shop steward at DeSoto.

Hitchcock testified that on being hired employees are advised of the Respondent's attendance and overtime policies and are told that they are expected to adhere to such rules or face termination. The Respondent introduced record evidence establishing that the 110-day probationary period, during which the attendance policy and apparently other company rules are stringently applied, is designed to assess the adequacy of the employees' work performance and their compliance with the requisite company rules and procedures. It is not uncommon for employees to be discharged during the probationary period for deficient attendance. Further, the Respondent has terminated probationary employees after ongoing reference checks have resulted in unfavorable histories. No such evidence presented by the Respondent, however, is specifically analogous to the instant matter.

Hitchcock testified that if Ornelas would have exhibited the same reluctance to work overtime as he did at DeSoto, this would have presented a problem for the Respondent. According to Hitchcock, the Respondent's employees customarily work an ''excessive'' amount of overtime, and an employee's reluctance to work overtime would present a burden for the Respondent even though the individual would not be violating any policy or contractual provision. Hitchcock did not explain, however, how any such burden would be placed

[2] Hamilton testified that the overtime policy and the manner in which it was enforced at the Respondent's facility is identical with the aforementioned DeSoto overtime policy and procedures and both are governed by the same contractual provisions with the Union. However, the Respondent works considerably more Saturday overtime than was the case at DeSoto.

on the Respondent. Thus, the Respondent may always require overtime in the event there are insufficient volunteers, and as the more senior employees are given preference in electing to work overtime, newer hires, such as Ornelas, for example, would be given no opportunity to refuse overtime.

Hamilton testified that he recalled several managers' meetings at DeSoto in 1990 during which staffing levels of the various departments were discussed. He recalled that some employees with greater seniority or bumping rights were considered to be less desirable than employees with lesser seniority, and in this context there was discussion of whether ''we can go further to get a particular employee'' who would otherwise be protected from layoff. According to Hamilton, Ornelas' name was mentioned during this discussion, although Hamilton did not know why other managers were targeting Ornelas; there was no specific discussion of Ornelas' attendance. Hamilton testified that in his opinion, performance, attendance, and overtime are interchangeable, and it is his impression that Ornelas simply had a problem in this area.

C. *Analysis and Conclusions*

The testimony of Johnson, Lyon, and Wright, which I credit, clearly shows that the Respondent's investigation of Ornelas' alleged ''attendance problem'' took place subsequent to Ornelas' discharge. Thus, Hamilton began the phone conversation with each of these individuals by advising them that Ornelas had previously been terminated, and that he was seeking confirmation of his opinion that Ornelas' past employment history with DeSoto was unsatisfactory.

Hamilton never directly supervised Ornelas at DeSoto and, except for union-related matters, had only casual contact with him. Nor was his limited knowledge of Ornelas' work based on any direct working relationship or dealings with him. Additionally, some 15 months had elapsed between Ornelas' layoff at DeSoto and his employment by the Respondent. Assuming arguendo that in fact Hamilton was legitimately concerned about Ornelas' past attendance problems at DeSoto, his recollection of such problems was vague and indefinite, having been allegedly gleaned and interpolated from various comments by DeSoto supervisors or managers; Hamilton simply did not know much about Ornelas' past work performance in general or his attendance problems in particular. Further, Ornelas had been hired after successfully completing the Respondent's interview and medical testing process, and had barely commenced his 110-day probationary period. Under these circumstances, it is unlikely that a responsible manager would feel compelled to summarily bring about the discharge of a newly hired employee prior to obtaining any specific corroboration of his past employment history. Yet this is what Hamilton sought to do.

Further, Personnel Manager Hitchcock, having been sensitized to the need to properly document discharges of minority employees, specifically instructed Hamilton to obtain corroboration of Ornelas' alleged past attendance problems in order to protect the Respondent from anticipated charges of discrimination. Inexplicably, Hitchcock then dismissed Ornelas, I find, before Hamilton had even begun to obtain such corroboration. Clearly, the undue haste with which both Hitchcock and Hamilton felt constrained to act is indicative, under the circumstances, of an ulterior motive, as the Respondent has presented no convincing business rationale for failing to postpone Ornelas' discharge until it had obtained sufficient information to justify the discharge.

The credible record evidence is abundantly clear, and I find, that in fact Ornelas had no attendance problem or any other type of work-related problem while working at DeSoto. In this regard, I do not credit Hamilton's testimony to the extent that it is inconsistent with the testimony of Johnson, Lyon, or Wright. Specifically, I find that Ornelas had absolutely no problem with what is commonly understood by the term ''attendance.'' To the extent that an outright refusal to work overtime may be characterized as an attendance related problem, the record is clear that while Ornelas had expressed his preference not to work overtime, he never refused to do so when mandatory overtime was required; and in seeking permission to be excused from overtime and/or refusing to volunteer for overtime work, he was conforming with the language and intent of the collective-bargaining agreement and the work rules then in effect. The Respondent has not shown that this admittedly proper and permissible adherence to the established rules was deemed to be a ''problem'' of any sort which would warrant the refusal to hire an employee.

Clearly, Hamilton harbored a negative perception of Ornelas at DeSoto. The only firsthand recollection that Hamilton had of Ornelas' DeSoto employment was that he was a shop steward; indeed, virtually the entire extent of Hamilton's direct contact with Ornelas was in his capacity as a duly designated representative of the Union. In this regard, it is significant that Hamilton's testimony demonstrates that he recalled Ornelas being referred to as a ''shit disturber.'' In the absence of any other explanation for such an epithet, and the Respondent has provided none, it may be reasonably presumed that Hamilton attached significance to this term as descriptive of Ornelas' role as a union steward. Further, former DeSoto Plant Manager Johnson characterized Ornelas as an assertive union steward who was persistent in his efforts on behalf of the employees. Similarly, former DeSoto Warehouse Manager Wright testified that Ornelas was ''assertive to the protection of himself and his employees . . . . So we simply didn't see eye-to-eye on a lot of things.'' Such portrayals of Ornelas by Hamilton, Johnson, and Wright are not disparaging of his work performance; rather, they are pointedly indicative of Ornelas' reputation as a staunch advocate of employees' concerns.

The General Counsel has established a prima facie case by presenting abundant credible record evidence showing that Hamilton was well aware that Ornelas was an assertive union steward and employee advocate, that, contrary to the Respondent's assertions, he was a good worker with no history of attendance or performance problems at DeSoto, and that he was precipitously discharged prior any verbal or documented confirmation that his employment at DeSoto was somehow deficient.

On the General Counsel's presentation of a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the decision to discharge an employee, it is incumbent on the Respondent to establish that the same action would have taken place even absent the

protected conduct.[3] The Respondent has failed to satisfy this burden. Thus, as I have found above, the record evidence shows that the discharge of Ornelas was not occasioned by any performance problem, real or, in good faith, imagined. The Respondent has proffered no evidence showing that it has either a policy or practice of discharging probationary employees based on vague recollections or unsubstantiated suspicions of past performance problems with other employers. Rather, the Respondent has amply demonstrated that it has a practice of discharging probationary employees only after receiving well-substantiated negative information, as a result of formal reference and background checks, sufficient to deem an employee unsuitable for employment.

While speaking with the former DeSoto managers following Ornelas' discharge, Hamilton was unable to obtain verification that Ornelas had any performance problems or attendance problems at DeSoto; to the contrary, he was told that he was mistaken. During the course of these phone conversations, however, he admittedly learned that Ornelas preferred not to work overtime. Significantly, in his March 19 affidavit to the Board, Hamilton failed to assert this as a reason for discharging Ornelas. Thus it appears that Hamilton initially regarded the overtime matter as unimportant. The Respondent now advances Ornelas' attitude toward overtime work as being a matter of singular significance, and asserts that this provided the Respondent with justification for his discharge.

However, as noted above, the Respondent has failed to demonstrate that a mere reluctance to work overtime, without more, is a valid reason for discharge. There is no evidence that any employee, whether in the employ of the Respondent or of DeSoto, had ever been discharged, disciplined, reprimanded, warned, or even given an ''occurrence'' demerit in accordance with the Respondent's formal Attendance Policy, for simply preferring not to work overtime or requesting to be excused from overtime work. Thus, Hamilton testified that working overtime on a voluntary basis was entirely up to the employee: ''We have a lot of people including myself with families. And I like to think that they can choose to come in and work on Saturday to make the money, or be home with their families.''

The simple overtime policy may be succinctly stated as follows: the Respondent, in its sole discretion, may require an employee to work mandatory overtime or may excuse the employee from working such overtime;[4] regarding voluntary (Saturday) overtime, the more senior employee is given preference in electing either to perform or not perform such work, and if there are insufficient volunteers, the least senior employees do not have the option of not volunteering. Therefore it seems clear that an employee's preference for or against overtime work is simply inconsequential to the scheduling of either mandatory or voluntary overtime, and would present the Respondent with no staffing or production problem. Indeed, as Ornelas was a new hire, it appears that he would be given virtually no opportunity to be excused from overtime work in either event.

In agreement with the contention of the General Counsel, I find that the Respondent's ''overtime'' rationale for discharging Ornelas is pretextual, and was seized on as an afterthought in an effort to give validity to an otherwise untenable position. Unlawful motivation may be inferred from the advancement of pretextual reasons for a course of conduct. *Limestone Apparel*, 255 NLRB 722 (1981); *Springfield Manor*, 295 NLRB 17 fn. 2 (1989).

Lastly, I have found that Hamilton simply was not truthful in recounting his conversations with the three former DeSoto managers. In the Respondent's April 10 position letter, and again at the hearing, Hamilton maintains that he contacted the managers prior to Ornelas' termination. This was not the case, as it is clear that the phone conversations occurred subsequent to Ornelas' termination. Moreover, in crediting the testimony of Lyon and Johnson, I find that, contrary to Hamilton's assertion, neither manager expressed surprise or, in effect, chastised Hamilton for hiring Ornelas because of a past attendance or overtime problem or for any other reason. Such proffered evidence, having been discredited, is indicative of an unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.3d 466 (9th Cir. 1966); *Active Transportation*, 296 NLRB 431, 432 fn. 8 (1989); *Weco Cleaning Specialists*, 308 NLRB 310 (1992).

On the basis of the foregoing, I conclude that the discharge of Ornelas was motivated by unlawful considerations, namely, the past union activity of Ornelas as an assertive union steward at DeSoto, and, as the same Union represents the Respondent's employees, the likelihood that he would assume a similar union position as an employee of the Respondent.[5] By such conduct, the Respondent has violated Section 8(a)(3) and (1) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(3) and (1) of the Act by discharging employee Daniel Ornelas on March 3, 1992, because of his activity on behalf of the Union.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(3) and (1) of the Act, I recommend that it be required to cease and desist therefrom and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Moreover, the Respondent shall be required to post an appropriate notice, attached hereto as an appendix.

Having found that the Respondent unlawfully discharged employee Daniel Ornelas, I recommend that it offer him immediate and full reinstatement, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings and benefits he

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[4] Obviously, an employee who does not have a legitimate excuse will be required to perform mandatory overtime work; and a general aversion to overtime work would not be considered a legitimate excuse.

[5] Although there is no direct evidence of animus or hostility toward the Union or toward Ornelas in his capacity as a union steward, such motivation may be inferred from a pretextual discharge, as found herein. *Whitesville Mill Service Co.*, 307 NLRB 937 (1992).

may have suffered by reason of the Respondent's discrimination against him. Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 181 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Sherwin-Williams Company, Emeryville, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their prior activity or probable future activity as union stewards or active union supporters.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to employee Daniel Ornelas immediate and full reinstatement to his former position of employment, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay or benefits suffered by reason of the discrimination against him, in the manner described above in the remedy section.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at the Respondent's Emeryville, California facility copies of the attached notice marked ''Appendix.''[7] Copies of said notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's representative, shall be posted by it immediately on receipt and maintained by the Respondent for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order, what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because of their past union activity with a prior employer as union stewards or or their probable future activity with this Company as union stewards or active union supporters.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL offer to Daniel Ornelas immediate and full reinstatement to his former position of employment, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole, with interest, for any loss of earnings he may have suffered as a result of our discrimination against him.

SHERWIN-WILLIAMS COMPANY

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''